No. 15,102

In the

United States Court of Appeals

For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY, a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Opening Brief

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JURISDICTIONAL STATEMENT

This action to collect the proceeds on a life insurance policy was commenced against appellant in the Superior Court of the State of California in and for the County of Alameda (R. 6). Appellant petitioned for removal (R. 3), and the action was removed to the Court below pursuant to the provisions of Title 28, United States Code, §§ 1332, 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between citizens of different states. The case was tried without a jury before Chief Judge Roche, whose Memorandum Opinion (R. 40) is reported at

137 F. Supp. 583. Judgment for plaintiff was filed February 8, 1956 (R. 79). A notice of appeal was filed March 6, 1956 (R. 80). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Preliminary

This is an appeal from the judgment awarding respondent the sum of $28,552.00, together with interest thereon from May 4, 1954, to date of judgment in the sum of $3,531.84 in an action to recover the proceeds of a life insurance policy. Appellant raised two defenses: suicide of the insured, and material misrepresentations of the insured in his application for the insurance respecting his drinking habits.

On September 24, 1953, at Lakeview, Oregon, the insured, William M. Houston, United States manager for three foreign insurance companies (R. 142), made written application to appellant The Canada Life Assurance Company for a $10,000.00 life insurance policy with family income rider. The policy was payable, initially in installments or, in the alternative, in a lump sum commuted value at the election of the beneficiary (R. 133).

As part of the application, the insured made certain written representations in Part II thereof entitled "Statement of Health—Medical." Question 6 asked, "(a) To what extent do you use alcoholic stimulants?" to which Mr. Houston answered, "Yes, socially only occasionally," and "(b) Have you ever used them to excess?" to which Mr. Houston answered, "No." Mr. Houston subscribed to the above answers by averring that "The answers recorded above are as given by me and are complete and true." (R. 41, Deft's Ex. C.)

On November 3, 1953, the policy applied for issued. This provided in part as follows:

> "Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first payment therefrom had this policy matured by reason of the assured's death." (R. 133)

On February 22, 1954, the insured died of a gunshot wound self-inflicted in a remote corner of the basement of his Berkeley home. At the time of the fatal shot, the insured had been bent over about horizontal to the floor, a short carbine rifle positioned nearly vertical to the floor and ceiling its butt resting upon the floor and its muzzle within one inch of his chest and pointed at the heart area, his hands accessible to the trigger. There was only one cartridge in the gun.

Shortly after the insured's death, respondent, widow of the insured, contacted her counsel (R. 405), who then proceeded to collect evidence (R. 116) and to employ certain experts (R. 523). He prevailed upon the Coroner to hold an inquest so that the Coroner's conclusion on the manner of death might be changed (R. 625, 628). An inconclusive Coroner's verdict resulted, based upon these experts' testimony, the senior investigating police officer not having testified at the inquest, nor, of course, any witnesses of appellant (R. 619, Pl. Ex. 6).

On May 4, 1954, after the coroner's jury verdict, respondent submitted her proofs of death to appellant. Appellant's investigation thereupon uncovered evidence of suicide, including expert testimony, which the trial court below refused to admit. The trial court, however, permitted respondent to prove the coroner's verdict, the testimony of her experts, and other inadmissible evidence. Basing its conclusion on such inadmissible evidence, and in the face of uncontradicted facts of suicide, the Court concluded that appellant had not proved suicide, nor insurance fraud. This action of the trial court of disregarding uncontradicted evidence of physical facts of suicide, and excluding appellant's evidence and admitting respondent's, are the errors of which appellant principally complains. Other errors appear also in the following resume of the case.

2. Uncontradicted Evidence of Physical Facts

On the day of his death the insured slept until about 1:30 p.m. (R. 351). He was awakened by his wife, the respondent (R. 351). He drank a glass of tomato juice left by his wife by the stairway leading to the first floor of his home and proceeded down the stairs (R. 351, 353). He was wearing pajamas, a robe and slippers (R. 356). He was not wearing his eye glasses, although it was unusual for him to come downstairs to breakfast without wearing them (R. 438). His wife was expecting him to come down and eat breakfast (R. 409).

Instead, however, he went downstairs, stopped to talk to and kiss his daughter, and went down to the basement into a far corner. Within five or ten minutes of the time he awakened (R. 601) and a minute and a half after talking to his daughter (R. 407) he fatally shot himself (R. 407).

The place of the shooting, indicated by marks of blood and the gun, was in the center of a passageway at a remote corner of the basement where ammunition for the gun was stored (R. 107, 125-126). The deceased was a tall man and would have had to stoop slightly to enter this area (R. 612), but, of course, not parallel to the floor as was the case at the time of the shooting,—the height there being five feet eleven inches (R. 461).

The only bullet or shell in the gun was the one which was fired. There was none in the magazine (R. 124).

The gun itself was a .30 caliber lever action carbine (R. 112). At the time of the fatal shooting the gun was in an almost vertical position to the floor. From a dent in the floorboard to the bullet hole in the ceiling, a criminologist determined that the gun had been almost vertical—only a slight angle off the vertical, viz., 6 degrees (R. 517). The dent in the floorboard (Pl. Ex. 12) was 33rd of an inch deep (R. 499), and similar to recoil marks made when the gun was fired after the event by pulling the trigger while *resting* the gun butt on the floorboard (R. 511).

At the time of the shooting the decedent had bent his body over the gun until his fingers were accessible to squeeze or push down upon the trigger, and his chest-heart area was within an inch of the gun muzzle. The gun muzzle was three feet from the floor, which in turn was some five feet eleven inches from the ceiling. His torso had had to be a little bit more than horizontal to the floor (R. 517, 518).

The entry wound was a *powder-blasted* hole in decedent's chest at the heart area. The exit wound was smaller and at a point in the back lower down than the entry in front (R. 506).

The path of the bullet, as shown from the gun being thus positioned at a near vertical, the body bent over, the muzzle *within an inch* of the powder-blasted heart area of the chest, was through the body, out a smaller hole in the back and at a point lower down than the front entry wound, and up to a spot on the ceiling almost vertically overhead. This bullet path through the body was confirmed by x-rays. The nature of the wound and the short length of the gun (three feet) indicated that the decedent was bent over more than parallel to the floor (R. 506, 526-527, 530, 517).

The body was found about fifteen feet away from the gun, face downward, with both hands underneath the prone body (R. 111).

There was no evidence of any kind that the gun had made contact with any object other than the floor. The only evidence relevant to the question whether the firing had been by an accidental jarring of the gun against some object was the testimony of a gun expert in his description of the gun and passageway. He testified that the passageway was crowded with protruding furniture when he investigated the basement *two months after the accident* (R. 523, 524-525), but that even so one could walk through the passageway (R. 530). In any event, he testified that striking the butt of the rifle on its sides did not discharge the gun (R. 528).

There was no evidence of physical facts of any kind which might have indicated that the decedent had accidentally pushed down upon the trigger. The only relevant evidence was that the gun had a five-pound trigger pull (R. 527) and the piece of floorboard (Pl. Ex. 12) which contained a dent similar to recoil marks made when the gun was intentionally fired by pulling the trigger while resting the gun butt upon the floor section (R. 476). There was no evidence

of grease on deceased's hands nor of marks on the gun to have indicated that deceased's hands had slipped while leaning on the barrel. All witnesses who knew testified that the deceased was careful with guns (R. 411, 488). His habit was to keep his guns loaded, but with cartridges only in the magazine, not in the chamber (R. 485). The gun had a safety mechanism in good order (R. 528).

3. Inadmissible Evidence of Experiments and Opinions Derived Therefrom

Over appellant's objection and subject to appellant's motion to strike, which was denied (R. 507-510, 526, 52, 54), the trial court admitted respondent's evidence of certain experiments made with the fatal weapon by witnesses employed by respondent, and which tests were made outside the presence of the court and any representatives of appellant. Lowell W. Bradford, a criminologist, testified that he submitted the gun to certain tests and succeeded in causing the gun to fire while the hammer rested against the firing pin, once by dropping it upon the floor and by hitting the hammer spur with a hammer (R. 528-529). This was witnessed by another criminologist, Paul I. Kirk (R. 512).

These witnesses then gave their opinions as to alleged possibilities of accident (R. 514, 515, 529).

No foundation for such testimony was laid to show similarity of conditions. *The cartridges used in these tests were not similar, in that the powder and bullets had been removed* (R. 531).

There was no testimony as to the height from which the gun was dropped, nor was there testimony as to the force with which the gun was struck by the hammer or upon the floor. There was no testimony that the type of surface against which the gun was struck was similar to plaintiff's Exhibit 12.

Neither expert testified that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance to have caused the gun to fire. No evidence of butt impressions was introduced showing similarity between the butt impressions made by intentionally pulling the trigger (R. 511, Pl. Ex. 12) and the impression caused by the firing when the gun was dropped. And no testimony was introduced showing that the gun had remained in the same condition between the date of death, February 22, and the date of the experiments, March 25.

4. Evidence, Admitted and Excluded, of Possible Motives, Drinking Habits, and the Deceased's State of Mind

Deceased, the United States manager for three foreign insurance companies, was about 50 years old, married to respondent, with two grown daughters (R. 337, 338). Although his salary was $20,000.00 a year, he spent about the amount of money he made (R. 403). Successively for several years prior to his death, he had been borrowing upon his life insurance policies, owing at the time of his death some $9,900.00 (R. 399-401). He also had incurred other debts and at the time of his death he had a $3,481.00 current liability (R. 402).

IMMEDIATELY AFTER THE SHOOTING, RESPONDENT TOLD THE INVESTIGATING POLICE THAT THE DECEASED "HAD PERIODS OF DEPRESSION AT TIMES," (R. 114). MRS. HOUSTON SAID AT FIRST THAT HE HAS PERIODS OF DEPRESSION AND WAS DEPRESSED LATELY," (R. 49). SHE ALSO TOLD POLICE THAT HER HUSBAND HAD NOT PLANNED ON DOING ANY SHOOTING OR GOING ON A HUNTING TRIP (R. 114).

Appellant's investigation of the death turned to Lakeview, Oregon, where evidence was adduced as to possible hidden motives for feelings of remorse and suicide, and also evidence of misrepresentation in the application for insurance.

It appeared that in October 1953 the deceased had been involved in an automoble accident with his company-owned Cadillac (R. 145). The accident happened while he was en route between Lakeview, Oregon, and Northern California, the deceased having intended to go across the state line (R. 146). The deceased told one witness from Lakeview three versions of the accident: One that he was alone, one that he was with a Mr. Irby and a girl, and one that he was just with the girl. The girl was a prostitute with purple hair (R. 184). Deceased paid her $1,000.00 cash the evening after the accident (R. 255-256).

The morning after the accident deceased telephoned his Claims Superintendent, Paul Youngers (R. 147). On orders of the deceased, Youngers was to "take care of" the collision damage to the automobile, which was self-insured by New Zealand Insurance Company (R. 145-146). Jointly, Youngers and the liability carrier delegated the investigation to an adjuster, Van Doren, in Klamath Falls (R. 147). Van Doren's report (R. 237-246) was stricken from evidence on respondent's motion to strike (R. 247-248).

Thereafter, on November 9, 1953, when deceased was in San Francisco, the prostitute involved in the accident wrote him, calling him "Bill," complaining that he was avoiding her and asking for a "loan" (R. 578-579, Def. Ex. K). He turned the letter over to his attorney, who dictated a reply signed by deceased's secretary (R. 579-580).

Shortly after the above accident, deceased had purchased in Lakeview on his own initiative a new Cadillac. For this he received a letter from his home office in New Zealand, stating in part. "I am aware of the circumstances which necessitated the replacement of your car and would have appreciated the opportunity of considering this matter before the new purchase was actually completed" (R. 168).

The association of drinking with the Oregon accident, as appears from the excluded report of Van Doren, led to further disclosures respecting the deceased's drinking habits while in Lakeview. One witness testified that deceased was under the influence of alcohol a great deal of the time when he visited Lakeview without his wife (R. 257). He would have as many as eight highballs (R. 254) and would drink in the morning (R. 251). A waitress in a Lakeview cafe testified that she had on occasion seen deceased in the cafe, that he had appeared to have had considerable amount to drink, that he acted overbearing and unruly, would try to serve himself, just take over, acted like a "big shot" and was intoxicated (R. 213-214). On one of these latter occasions he was wearing a coonskin cap (R. 214). One witness, Mrs. Virginia Wilkerson, who had known him and was a friend of his for about ten years (R. 249), testified that his nickname was "Wild Bill Hiccup" (R. 251).

Respondent's evidence consisted of testimony contrary to this evidence of drinking habits. There was testimony of moderate drinking, but no direct contradiction as to the drinking at precise times and places testified to by appellant's witnesses (R. 468, 567, 429). Respondent produced testimony to the effect that the deceased seemed unaffected by the facts set forth above which were suggestive of pos-

sible motive (R. 378, 177, 191). Respondent in effect disavowed her statement to the police that the deceased had had periods of depression (R. 408). As is usual in these cases, evidence of future plans (R. 553, 383) and satisfactory relations with employer (R. 551-552) and family (R. 338, 418, 442) was produced. Although deceased shortly before his death had appeared *"kind of mad, pre-occupied and bothered"* (R. 387) about an annual report to be filed in the states in which his companies did business and which required revision because of an error, the weekend before his death he did not appear different to his family or friends (R. 387, 419, 456, 548). And on the afternoon of his death, between the time he awoke and the time of the shot, he appeared to his wife and daughter congenial and happy (R. 351, 422).

More significant, however, was respondent's evidence descriptive of deceased's personality; to the layman deceased would appear quite unlikely to have committed suicide. He was an extrovert, friendly, dynamic, very, very vigorous (R. 381). "Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life? A. He enjoyed it more than anybody I have ever met before or since." (R. 468). "Well, he was always a very cheery person. He always had something doing. He was always active . . ." (R. 564). "Mr. Houston was an extrovert. He was probably the least moody person that I know of. He was a very congenial, happy soul" (R. 196). In Lakeview, Oregon, he apparently was even more so. While his San Francisco friends and business associates testified that deceased would have anywhere from two to four drinks before lunch or dinner (R. 153-154, 169-170), according to witness Wilkerson when he was in Lakeview without his wife he would be under

the influence of alcohol a great deal of the time (R. 257). There was a marked difference in his behavior in San Francisco and Lakeview. "Here he was 'Wild Bill,' and there he was the manager for the New Zealand Insurance Company" (R. 254). This difference in behavior was called a "Jekyll and Hyde" transformation (R. 255). He exhibited there certain odd traits. He was hypochondriacal (R. 252), egotistical (R. 252), would monopolize conversations (R. 252); once had fired a gun in a real estate office (R. 252). He was selfish (R. 256), wasn't considerate of other people (R. 257), yet he was very interested in social work (R. 316). He acted in an exhilarated mood (R. 319). He liked a roaring good time (R. 257).

To appellant's expert medical witness, however, the above evidence would have been particularly significant. Dr. A. E. Bennett, professor of and practitioner of psychiatry for many years, who had made a special study of suicide and had written several papers dealing with suicidal tendencies (R. 290-291), who had treated many hundreds for suicidal tendencies as the major part of his practice (R. 292-293), described the suicide-prone cyclothymic personality. His testimony is uncontradicted. Such a person could be one who loves life, is happy at home and happy and successful in business (R. 293). They frequently are extremely successful businessmen (R. 298). They are extroverted, outgoing people (R. 298). The cyclothymic personality is an individual who is subject to mood swings, either elation or depression, that go beyond the normal (R. 293). Excessive mental strain or fatigue, or physical fatigue, while the individual is in the depressive phase, may cause him to take his own life (R. 294). Fifteen to twenty per cent of these cases end up as suicides (R. 304).

Appellant combined in a hypothetical question what was known of deceased's personality and behavior, his extroversion, his hypomanic Lakeview behavior, his seemingly normal San Francisco behavior, respondent's statement to the police that he had periods of depression and had lately been working hard and long hours and was under stress, and asked this medical expert on suicide whether the individual so described fell into one of the suicidal tendency types (R. 295-297). Respondent's objection to the question was sustained (R. 297, 298).

5. Exclusion of Evidence of Appellant's Underwriting Practice Respecting Drinking Habits

In support of its misrepresentation defense, appellant called its Assistant Secretary, who had been trained in underwriting and allied fields (R. 131). He testified that the appellant company, in issuing the policy sued upon, relied upon the representations and statements contained in the application therefor (R. 325). But, the trial court refused him permission to testify whether appellant would have issued its policy had it known of deceased's drinking habits (R. 327-329) and refused to permit him to testify what the company practice was at the time the policy was issued regarding an unfavorable personal history of drinking habits (R. 329).

6. Exclusion of Evidence of the Circumstances Surrounding the Making of the Coroner's Jury Verdict and of Opinion Evidence to Rebut the Verdict and the Opinions of Respondent's Experts

As stated before, respondent, over appellant's objection, put into evidence the Coroner's jury verdict (R. 330-331, 335) and the opinions of her experts as to whether the gun

could have been discharged either accidentally or intentionally (R. 529). But appellant's efforts to explain the circumstances surrounding the making of the verdict and to refute respondent's experts' opinions with the conclusions of its own experts were blocked by respondent's sustained objections. Appellant called the Alameda County Coroner, who, during his thirty years service had on numerous occasions per year investigated and reached conclusions as to suicidal deaths (R. 625). The court refused to allow the Coroner to testify as to his conclusion respecting the cause of death (R. 628, 625) and his reasons for not having called a Coroner's jury until prevailed upon by respondent's counsel (R. 628). Appellant also called the homicide inspector who had charge of the police investigation of the insured's death, but who did not testify at the inquest, Inspector Edwin F. Parker (R. 616). The court refused to allow him to give his conclusion as to the manner of death (R. 620). Appellant also called another policeman who had investigated insured's death, Patrolman Kenneth Pine (R. 601). And the court refused to allow him to give his conclusion as to the manner of death (R. 606, 607).

7. Findings and Judgment

The court found that the deceased did not die as a result of suicide but as a result of a gunshot wound accidentally inflicted (R. 76, 77), saying in its memorandum opinion, "If the court was of the view that the evidence presented spelled out but one conclusion, namely, suicide, it would not hesitate entering judgment for defendant herein," (R. 46). The court also held, "In the instant case there is nothing, either in insured's actions or statements, which would indicate suicidal intent or disposition," (R. 51). The court also found

(1) that the deceased did not know that any of the statements in the application were untrue, (2) that the deceased made no false representations in the application, (3) that his use of alcohol was not excessive nor unusual, (4) that his statements were not material misrepresentations (R. 75, 76). In fixing the amount of judgment including interest from May 4, 1954 (R. 79), the court found that the proofs of loss were filed with appellant on May 4, 1954 (R. 73), but nowhere found, nor was there evidence of, any election by plaintiff to take the full commuted value of the policy as of that date or any date.

SPECIFICATION OF ERRORS

1. The Trial Court Erred in Finding That the Insured Did Not Die as a Result of Suicide But as a Result of a Gunshot Wound Accidentally Inflicted.

This finding is erroneous for three reasons: *first,* it is based upon an erroneous theory as to appellant's burden of proof; *second,* in any event, the uncontradicted evidence of physical facts, and the evidence as a whole, is inconsistent with any reasonable hypothesis except suicide; *third,* there is no competent evidence whatsoever of physical facts to show that the fatal shot was accidentally discharged.

2. The Trial Court Committed Prejudicial Error in Admitting, and in Denying Appellant's Motion to Strike, the Testimony of Lowell Bradford and Dr. Kirk Regarding the Results of Gun-Firing Experiments and Their Opinions Derived Therefrom.

The grounds urged in appellant's motion to strike were "that said testimony was incompetent, irrelevant and immaterial, not a proper subject of expert testimony, and not conducted under circumstances similar to the death of deceased * * *" The grounds urged at the time of objection were: "Well, your Honor, we will object to that on the

ground that it would be evidence of a test by a ballistics expert which anybody could perform. There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting * * * speculation * * *" (R. 507). "Q. Did you make any tests at all in connection with Mr. Kirk or by yourself to determine the manner in which that gun might be discharged, how the gun could be fired? Mr. Clausen: I just assume, your Honor, when my objection I said runs through the line, it includes any such testimony? The Court: Let the record so show" (R. 526).

The substance of Dr. Kirk's line of testimony is as follows:

> "Q. Now, did you examine the gun—that's Defendant's Exhibit B—to determine under what conditions that gun could be fired or discharged?
>
> "A. Yes, I examined it in connection with Mr. Bradford. The two of us worked together on it at the time. We tested various possible ways of firing it, and examined the loading mechanism, and so forth" (R. 507).
>
> "Q. Dr. Kirk, did you discharge this gun by dropping it?
>
> "A. I witnessed the discharge of this weapon by striking it when the hammer was down on the firing pin. Mr. Bradford actually had the gun in his hand" (R. 512-513).
>
> "Q. Now, as a result of your investigations with this gun, what in your opinion, would be the different ways in which that gun could be discharged?
>
> "A. Well, certainly it could be fired in the normal manner, it could be cocked and the trigger could be pulled. It could be fired if the hammer is on the firing pin; it could be fired by striking the butt. It could perhaps, though I did not see this reproduced, nor did I reproduce it, be fired by a snapping action between the half-cocked position and the fully-down position;

that is, there was always an indentation placed in the primer of this gun under those circumstances, but it was normally not deep enough to fire. It could happen, however. The most probable ways, of course, are methods which would involve the cocking of a loaded gun and some mechanism whereby the trigger is pulled. That is, either by the finger intentionally or by other methods" (R. 512-513).

"Q. In your opinion, Dr. Kirk, assuming a man six feet one and a half or two inches tall, and in that location where the hole was cut and where the gun was discharged, and assuming that he was bent over, as he would be required to be because of the height of that ceiling, which was less than his height, and assuming that he had reached into the corner to get that gun and had turned around and reached over to close that mechanism, in your opinion, could that mechanism have been—the gun have been discharged?

"A. Yes, it is my opinion that could very definitely have happened." (R. 514-515).

The substance of Lowell Bradford's testimony is as follows:

"Q. And will you state what the results of your tests were?

"A. The first test that I made was a test on the trigger pull, using a trigger pull gauge. I found that the gun did not always discharge at the same trigger pull, and the range of variation was from four and a half to five pounds. It would always fire with five pounds pull; sometimes it required as little as four and a half pounds. The second test was to determine the effectiveness of the safety mechanism, if any. And there is only one safety mechanism on this gun, which is known as the half-cocked position. Shall I demonstrate that?" (R. 527).

"Q. Yes, do you want the gun?

"A. Yes, please. The firing pin has three possible positions. One is when it is fully retracted in the firing position; the second when it is let down carefully in what is known as the half-cocked position. In that position the firing pin does not lie on the—the hammer does not lie on the firing pin; there is a space between. The third position is the position following firing when the hammer is directly on the pin. And that position can be reached by quickly letting down the hammer —as the trigger is pulled, letting down the hammer with the thumb past the half-cocked position. This half-cocked position is what I referred to as the safety position. It appears to be in good order, that being the only safety mechanism. The other tests that I made had to do with being able to dislodge the hammer from the cocked position by striking first on the left side with a hammer, then on the right side, then on the bottom, then on the top, and then by jarring the butt. And I found that the hammer in the fully-cocked position would not dislodge from any one of those positions with a blow. The next test was to place in the chamber of the barrel a round ammunition from which had been removed the bullet and the powder, the detonating cap or primer still being in the cartridge case. The hammer was let down by using the combination of releasing the trigger with the thumb on the hammer, was let down past the half-cocked position, so that the hammer rested upon the firing pin. At that point the hammer spur was struck a light blow with a hammer and the round in the barrel discharged. The next test that was made was to place a round of ammunition in the chamber, again with the bullet and powder removed, with the primer cap still intact in the cartridge. The hammer was again let down past the half-cocked position to the firing pin, and the rifle was dropped on the floor butt first in this manner (illustrating). And upon one of

those occasions the round discharged in the barrel. I think that is the extent of the tests except that I examined it generally for mechanical condition and I found that there was a tendency for the latch mechanism of the lever to open rather easily if any vibration or jar was applied to the gun, so that it was easy to place it in a position to open" (R. 527-529).

"Q. And anyone moving over to close it would be leaning over the gun in a stooping position; is that correct?

"A. It would be necessary to stoop to reach it, yes."

"Q. Then, as I understand your testimony, Mr. Bradford, this gun could be discharged either accidentally or intentionally; is that correct?

"A. Yes, that is correct." (R. 529).

3. The Trial Court Committed Prejudicial Error in Excluding from Evidence the Written Report of the Adjuster, Van Doren, Regarding the Oregon Automobile Accident.

The grounds of objection urged by respondent were that this report was "incompetent, irrelevant, immaterial, no bearing upon any issue in this case, that it is hearsay as to Mr. Houston and the plaintiff in this case, and the statements in there are wholly self-serving declarations and not binding in any way upon the plaintiff or upon Mr. Houston and it is not shown—it is positively to the contrary that Mr. Houston did not see this report or did he ever have any conversation with anyone about the report after the things was or at the time of being prepared." (R. 247-248).

The substance of this report follows.

"Gentlemen: This will confirm telephone assignment on this case from Mr. Paul Youngers of New Zealand Insurance Company, and furnish report of my activities in accordance with this assignment.

"Mr. Youngers was unable to make contact with me until approximately five P.M. on October 20th. I was

asked to immediately make a trip to Lakeview to contact Mr. William M. Houston, United States Manager for New Zealand Insurance Company, who was in Lakeview, and had been involved in an accident while driving a Cadillac sedan owned by New Zealand Insurance Company. I was able to make telephone contact immediately with Mr. Houston and arranged to meet him at Hunter's Motel in Lakeview at 10:30 p.m. that night.

"This accident occurred sometime after midnight in the early morning hours of October 19, 1953. The definite time was not established, although it was probably between 1:30 and 2:00 A.M. Mr. Houston had been in Lakeview for some time, staying at one of his ranches, and he had invited Mr. Alton F. Irby, Jr., of A. F. Irby & Company, 40 Pryor Street, S. W., Atlanta, Georgia, to visit him and enjoy some bird hunting. Mr. Houston and Mr. Irby had come into the bar of the Hunter's Motel at approximately 11:30 P.M. on Sunday night, October 18th, where they met. allegedly for the first time, Vivian P. Chipman. They became acquainted and had one drink at this bar. The bar closes at twelve, and apparently this association of the three people proved to be mutually congenial and stimulated the mutual desire on the part of all three for further comradeship and association. It was then decided that the three of them would drive to Alturas, California, which is approximately 56 miles from Lakeview, where they could attend a dance and would find bars open until 2:00 A.M. The three of them then started out in the Cadillac sedan for Alturas, and after traveling about 45 miles and getting to a point within 11 miles north of Alturas, they met with an accident.

"This accident occurred in an area known as Chimney Rocks, and at a point where a new highway is being constructed, and apparently the accident took place right at the junction of the new highway with the old highway. The section of new highway at this

point is not completed and is barricaded off. The new highway is on a graded roadbed higher than the old highway. Mr. Houston, who admits he was traveling 60 to 65 miles an hour, was confronted with several deer crossing the highway directly in front of him. He tried to avoid hitting the deer by swerving to his left and trying to get onto the new highway roadbed. He hit the flimsy barricade and apparently swerved out of control * * *

* * * * * * *

"We have a situation here of two prominent business men being involved in an accident causing injuries to a very attractive young lady, of rather doubtful character and background, under circumstances not entirely complimentary to Mr. Houston and Mr. Irby. There was the background of drinking and some possibility of successful prosecution of just claim against Mr. Houston and the New Zealand Insurance Company.

"Vivian P. Chipman is 26 years of age, resides at 8635 Trojan Street, Novarro, California. She claims to be a divorcee, having secured a divorce approximately six months ago from Dale Chipman in Los Angeles * * Mrs. Chipman claims to be a bar girl * * *

"She was taken to W. P. Wilbur, M. D., for examination. X-rays were taken of her chest and it was determined by Dr. Wilbur that she was suffering a separation of the sternum, and she had a hematoma on the low back region just about the left hip. She was somewhat dazed and confused from the impact of the accident, although I don't believe there was a history of unconsciousness to indicate concussion of any degree. The doctor wanted to hospitalize her at the Lakeview Hospital, but she refused to submit to this treatment, feeling she would be better off in a motel room at Hunter's Motel. Mr. Houston and Mr. Irby were very solicitous for her welfare and did everything possible to provide for her comfort, probably going somewhat beyond the bounds of ordinary

care and attention that one generally finds in a situation following an accident.

"There is some element of mystery as to why this woman, with her very obvious background, would be in an isolated rural community such as Lakeview. She claims to have been in the area for approximately a month, and on the expressed reason of being there for rest and solitude, which, of course, she could find in abundance in that area. It was claimed by all three persons that the meeting at the bar at Hunter's Motel just prior to the accident was the first time these three people had become acquainted.

"There is every indication that this was the type of case that immediate settlement should be attempted before this claimant got back to her home environment and under the more direct influence of her well-wishers and friends. This situation was recognized by Mr. Houston and Mr. Irby and they set the stage for this treatment of the case. Apparently Mrs. Chipman's mother had been to Lakeview, expecting to pick up Mrs. Chipman and drive her back to Los Angeles, but the doctor advised against such a long automobile trip, and so the mother had left without the daughter. I didn't meet the woman, but it was reported that she was rather domineering, and obviously very anxious to get the daughter back under her control, and into the hands of some attorney so that the case would be prosecuted to the fullest extent.

"Some Jewish boyfriend in Oakland had called Mrs. Chipman long distance and given her explicit instructions that she was not to sign any papers of any kind, and to leave her case open until she got back to Oakland. She apparently had arrangements made with this individual to stay at his home after she got into Oakland on her return from Lakeview. It is reported that this individual's name was Izzy Cantrovich. I am satisfied that this situation existed because Mrs. Chipman confided in me after the settlement was com-

pleted that this man had called her and told her these things, and that also one or two girlfriends had called her up to congratulate her on the fine position she had attained, and to speculate with her as to how much money she could collect.

"Mr. Houston had expected that I would arrive with a large amount of cash so that a settlement could be consummated immediately, and a tender of actual cash made rather than a draft or a promise of a settlement draft. I was not prepared to handle the case in this manner. Mr. Houston then got busy and wrote personal checks securing all the available cash he could dig up in Lakeview at that hour of the night. He finally came up with $800 in currency.

"After being armed with this currency, the writer and Mr. Houston then called on Mrs. Chipman where she was confined to her room. This was approximately 11:30 p.m. It was my impression after visting with the woman for a few minutes that she was somewhat overawed, confused and apprehensive. I felt under the circumstances a soft approach would be more effective, and every attempt was made to visit with her and gain her confidence. Mr. Houston felt it would take $1200 to settle the claim, based on the fact that the doctor told her she couldn't work for two months, and he had computed eight weeks' loss of wages at $150 a week to arrive at this $1200 figure. I gained the impression that he perhaps had, through his previous contacts with this lady, intimated in some way that she would receive that amount of money in settlement, exclusive of her hospital expense. I secured the attached signed statement from her before talking settlement. After some discussion we were able to secure her signature to the attached release for $1,050 * * *

* * * * * * *

"We have a rather complex situation here in that the statement secured from Mrs. Chipman completely

exonerates Mr. Houston, and would seem to indicate there is no basis for substantiating any claim under the guest law for California.

"Mrs. Chipman's attitude at the time of our contact was one of complete understanding and cooperation. She expressed many times she had no desire or intention of making any trouble for Mr. Houston. On the other hand, we had a young lady whose whole background and appearance suggested a person of loose morals, and whose attitude toward employment and the opposite sex was most definitely unconventional. The contacts from her circle of friends and natural environment indicated that after she returned to her home she would be subject to unusual pressure to attempt to capitalize on this accident. This lady is somewhat childlike in her mental processes, and degree of intelligence, and there is a very good chance that her attitude could be changed by this influence and pressure from her well-wisher friends. We felt that in view of all these circumstances involved, it would be better to have a release executed by her immediately."

* * * * * * *

4. The Trial Court Committed Prejudicial Error in Sustaining Respondent's Objection to the Hypothetical Question Put to Dr. A. E. Bennett.

Respondent's grounds of objection were that "it is compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston, and upon the ground it is not proper examination" (R. 297).

The question asked follows.

"Q. Now, doctor, assume a person about 50 years old married, with two grown daughters, United States

manager of a foreign insurance company, the salary about $20,000 a year, several known pressing debts, accustomed to having alcoholic drinks before lunch and dinner, he is the productive go-getter type, occasionally traveled, on production trips, getting out to meetings and getting business on these occasions, would also occasionally have alcoholic drinks; while in San Francisco engaged in his activities he is reserved and quiet, refined, although of a friendly, gregarious, extrovert nature, but in Lakeview, Oregon, while on vacation, on hunting trips, without his wife, usually he is in an exhilarated mood; the difference in his demeanor from the San Francisco conduct may be described as a 'Jekyll and Hyde' transformation. While in Oregon he dresses in cowboy clothes. On occasion, for example, wears a coonskin cap. He acts rather overbearing, unruly; for example, tried to serve himself in a restaurant, 'just takes over,' acted in the parlance of the street as a 'big shot.' Monopolizes conversations, been inconsiderate of other people, likes a roaring good time, has been a fast driver, egotistical, yet interested in social work, takes pills and has a cure for everything, has been concerned about his health. On one occasion, for example, fired a rifle in his host's real estate office. Has gone under the nickname of 'Wild Bill Hiccup.' He would be under the influence of alcohol part of the time. On occasion would begin drinking in the morning, have drinks during the day; accustomed to having drinks during the day. Before his death he was involved in an automobile accident with a woman passenger, whom he demonstrated anxiety to get hurriedly paid, who was paid some thousand dollars, who is rumored to have written him since. His wife, at the time of the policy investigation of his death, February 22, 1954, reported to the police substantially that he had periods of depression and recently had been depressed, shortly before his death. His death occurred by gunshot wound through the left

breast, the carbine, the muzzle of the carbine pressed against or right close to his breast while leaning over parallel to the floor; his arm able to reach to the trigger of the carbine so that the body is parallel to the floor and the bullet goes up to the ceiling straight up from where the gun was pointing, and this was shortly after he arose at about one-thirty in the afternoon following a dinner party which had lasted until about eleven-thirty the night before, at which party he had some drinks, one or two or more drinks. At the time of his death he is dressed in his sleeping clothes and the shooting occurred in a lower remote corner of the basement of his Berkeley home. Now, from my description and assumptions here, Doctor, will you tell me whether that individual falls into one of the suicidal types?"

5. The Trial Court Committed Prejudicial Error in Excluding Evidence of the Circumstances Surrounding the Making of the Coroner's Jury Verdict, and of Opinion Evidence to Rebut the Verdict and the Opinions of Respondent's Experts.

The grounds urged by respondent were that the opinions of the policy and Coroner were "incompetent, immaterial, irrelevant, not within any issue in this case, calls for opinion or so-called expert testimony without having established the qualification, * * * that the question whether a death is due to accident or suicide, under all the cases * * * is not subject to opinion or expert testimony" (R. 607, 619, 625).

The substance of the excluded testimony of Officer Pine appears in Deft. Exhibit L:

> "In my opinion, the victim took the gun from a place of storage other than in the outer basement section, went to the far corner of the outer basement section, secured the shell from the paper bag, loaded the gun, bent over it and pulled the trigger."

The substance of the excluded testimony of Inspector Parker presumably would have been the same as his report, part of Defendant's Exhibit J:

> "While no suicide notes were found and no reason is apparent at this time for his committing suicide, the very nature of the wound is such that it would be highly improbable that it was an accidental one * * *"

The questions asked of the Coroner, Bungarz, were as follows:

> "Q. And did you tell Mr. Angell that you had reached a conclusion yourself at that time?
>
> "Q. And did you tell Mr. Angell the reasons why you had reached the conclusion you had reached?
>
> "Q. Was there any testimony given at the inquest which in any manner changed your original impression?" (R. 628-629).

6. The Trial Court Erred in Finding That the Deceased Made No False Representations in the Application for Insurance, That the Deceased Did Not Know That Any of the Statements Therein Were Untrue, That His Use of Alcohol Was Not Excessive Nor Unusual, and That His Statements Were Not Material Misrepresentations.

This finding is erroneous because it is contrary to uncontradicted evidence of excessive drinking, because the questions asked in the application do not call for the opinions of the applicant, but for the facts and because as a matter of law the statements therein are material representations.

7. The Trial Court Committed Prejudicial Error in Excluding Evidence of Appellant's Underwriting Practices Respecting Drinking Habits, and Whether Appellant, in the Light of Such Practices and With the Knowledge of Deceased's Drinking Habits, Would Have Issued the Policy Sued Upon.

Respondent's objections to this evidence were based on the grounds that it was "incompetent, irrelevant, and imma-

terial, calling for the conclusion of this witness, asking for opinion testimony, which opinion testimony is not admissible * * *" (R. 327-328-329).

The questions asked of appellant's Assistant Secretary were as follows:

> "Q. All right. And if the company had had that information, in the light of your experience and practice, with the company, would the company have issued its policy of insurance?"

The striken answer was:

> "A. It wouldn't" (R. 327).
>
> "Q. What is the company practice—what was the company practice at the time this policy was issued, Mr. Wainwright, with regard to an unfavorable personal history of drinking habits?" (R. 329).

8. The Trial Court Erred in Concluding That Interest Was Due from May 4, 1954, Upon the Amount of Commuted Value.

This conclusion of the trial court is erroneous in that there was no finding or evidence that respondent gave notice to appellant on May 4, 1954, or any other time of her election to take the commuted value of the policy.

SUMMARY OF THE ARGUMENT

1. The judgment should be reversed, because, as appears from the trial court's memorandum opinion, the judgment below was based upon an erroneous legal theory respecting appellant's burden of proof. Under the case law, appellant was not required to establish but "one conclusion, namely, suicide" but rather merely the reasonable conclusion of suicide. Nor, under the case law, was appellant required to prove the precise reason why deceased took his life or to disprove completely any and all fanciful theories of accident which were not based upon some competent evidence of physical facts.

2. Judgment should be directed for appellant, because the cases so hold where, as here, the uncontradicted evidence of physical facts is consistent with a theory of suicide but is inconsistent with a theory of accident. Under such case law, it was respondent's burden to support any proffered theory of accident with competent evidence of physical facts, but no such evidence was produced. The evidence of insured's happy homelife and surroundings has been held not inconsistent with suicide, which holding is supported by expert testimony below. Assuming that respondent's evidence that the rifle could have been discharged by striking the butt or hammer spur was competent evidence, there is no evidence of physical facts to show that the rifle was thus discharged, although respondent had the opportunity and used it to attempt to collect evidence against suicide. Rather, the evidence of physical facts is consistent with a theory of suicide and is inconsistent with any theory of accident, and even though no possible motives were proved (although they were), the cases hold that in such case the defense of suicide is proved as a matter of law.

3. The judgment should be reversed, because the trial court erred prejudicially in ruling on evidence on the issue of suicide. The court should have sustained appellant's objection and should have struck the testimony of respondent's ballistics experts, because (1) respondent failed to lay a proper foundation for her evidence of experiments, inasmuch as respondent failed to prove that the gun had remained in the same condition from the date of the death to the date of the experiments, and respondent failed to prove that the cartridges used were similar, that the type of surface against which the butt was struck was similar, that it was possible, from the amount of speed or force by which they succeeded in having the gun discharge for the deceased

to have so discharged the rifle and have ended up in his known position; because (2) the evidence proved nothing, no evidence having been produced that the gun had remained in the same condition from the date of death to the date of the experiments—it was incompetent, irrelevant and immaterial; because (3) under the case law the opinions of the experts as to possibilities of accident were not the proper subject of expert testimony and were not based upon competent evidence in the case.

The trial court should have sustained appellant's objection to the introduction of the Coroner's certificate and jury verdict for irrelevancy, there having been no issue as to date of death or submission of proofs of loss. But having so admitted them, the court, in accordance with case law, should have allowed appellant to explain and rebut the opinions contained therein, and in the testimony of respondent's experts, by the testimony of the Coroner, and the police, experts in the determination of suicide.

The court erred in excluding the adjuster's report of the Oregon automobile accident, since it was made by him as a result of his agency relationship with deceased and within the scope of his authority.

The court erred in refusing to allow appellant's expert medical witness to evaluate the evidence respecting deceased personality to determine whether or not his personality was of a suicidal type. Similar evidence has been admitted in other cases, and should be, because it requires the special study and training possessed by appellant's expert witness, and also because it rebutted such of respondent's evidence as led the trial court, erroneously, to say that "in the instant case there is nothing, either in insured's actions or statements, which would indicate suicidal intent or disposition."

4. The judgment should be reversed, because appellant's evidence of deceased's drinking habits showed he made material misrepresentations in his insurance application. In any event, the judgment should be reversed because the trial court erred in excluding testimony to the effect that appellant would not have issued its policy had it known of deceased's drinking habits, and testimony of insurance practices respecting an unfavorable history of drinking habits. Both these items of evidence are admissible under California law and decisions directly in point. No substantial evidence, therefore, supports the trial court's findings that deceased made no material misrepresentations in his application.

5. Finally, the judgment awarding interest on the commuted value from May 4, 1954, to date of judgment is erroneous, inasmuch as respondent proved no notice of election to take such amount as of said date. Interest as damages is allowable only where the right thereto is vested as of a day certain. Since the appellant's obligation under the policy was initially to pay installments or, in the alternative, to pay the commuted value,—and respondent gave no notice of election between them, under the provisions of Cal. Civ. Code § 1449 her right to choose between them was waived, and absent such notice of election, there is no proof as to the date upon which her right to interest vested.

ARGUMENT

I.

THE UNCONTRADICTED EVIDENCE OF PHYSICAL FACTS IS CONCLUSIVE PROOF OF SUICIDE. APPELLANT THUS SUSTAINED ITS BURDEN OF PROOF AT THE TRIAL LEVEL, AND UNDER THE LAW APPELLANT WAS NOT REQUIRED TO GO FURTHER AND PROVE THE PRECISE REASON FOR THE SUICIDE OR TO ELIMINATE ANY POSSIBLE THEORY OF ACCIDENT. TO COMPEL APPELLANT, AS DID THE TRIAL COURT, TO SHOULDER SUCH AN IMPOSSIBLE TASK IS CLEARLY ERROR, AND ITS FINDINGS OF ACCIDENTAL DEATH, BASED UPON THE CLAIMED FAILURE OF APPELLANT TO PROVE THE PRECISE MOTIVE AND DISPROVE SUCH OTHER THEORIES, ARE CLEARLY ERRONEOUS AND SHOULD NOT BE SUSTAINED.

As indicated by its memorandum opinion the trial court felt that appellant failed to sustain its burden of proof for failure to disprove respondent's fanciful suggestions of accident (R. 46) and failure to establish "suicidal motive" (R. 52). The court would have found for appellant, apparently, only if "the evidence presented spelled out but one conclusion, namely, suicide" (R. 46). Thus the trial court's whole approach to the case began on an erroneous angle. For it was not appellant's burden to produce evidence which spelled out but "one" conclusion, nor was its burden to establish suicidal motive or to completely disprove fanciful suggestions of accident. Appellant's burden was merely to produce evidence which would lead reasonably to the conclusion that the deceased committed suicide, regardless of any other theories that might be posed by the evidence.

As the California Supreme Court said in *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 82:8 "There was no error in the instructions to the jury as to the pertinent suicide provisions of the insurance policies, and that if the jury found 'by a preponderance of the evidence' and was

satisfied from the evidence that the deceased committed suicide, the finding must be for defendant."

Proof of the suicidal motive is not a *sine qua non.* As the court said in *Beers v. California State Life Ins. Co.,* 87 C. A. 463, "* * * the proof of motive is not indispensable * * *" There, lack of proof of motive was relied upon by the appellate court in affirming a judgment for the beneficiary, yet the court also said, at page 457: "Undoubtedly the circumstances specially stressed by the defendant as involving conclusive proof of suicide are, as before we have said, indicative of a designed self-administered death, and it is to be conceded, as likewise has been stated, would afford sufficient support to the conclusion, had such been the result of the jury's deliberations, that the deceased committed suicide." (p. 457).

In fact, to compel defendant to prove the precise reason why deceased took his life would be a most unfair and unjust rule. Certainly an insurance man as deceased, who was bent on suicide, would not deliberately have left traces of motive, such as suicide notes, knowing that they would deprive his family of insurance monies. His actions would have been precisely the opposite. And, in any event, "It is * * * common knowledge that suicide is usually committed with as much secrecy as possible, and could be but rarely shown except by proof of the facts and circumstances attending its commission." *Brotherhood of Maintenance of Way Employees v. Page,* 123 S.W. 2d at 536. "Absence of an apparent motive to take one's life does not preclude a finding of suicide. In *Aetna Life Ins. Co. v. Tooley,* (16 Fed. 2d 244) cited by defendant, the court said, * * * it is not to be denied that successful business men, living in pleasant surroundings, do commit suicide * * *" *Knapczyk v. Metropolitan Life Ins. Co.,* 53 N.E. 2d 484.

As is more fully set forth below, appellant contends that the physical facts, and the evidence as a whole, can support only one reasonable hypothesis: suicide. A DEATH OCCURRING BY GUNSHOT WOUND THROUGH THE HEART AREA, WHILE BENT OVER HORIZONTAL TO THE FLOOR, WITH THE CHEST WITHIN ONE INCH OF AN UPRIGHT CARBINE, THE FINGERS ACCESSIBLE TO THE TRIGGER, AND WITH ONLY ONE CARTRIDGE IN THE GUN, CERTAINLY PRESENTS A THEORY OF SUICIDE.

And, contrary to the opinion of the trial court, this was all that appellant had to prove, even assuming, *arguendo,* that some other theory might be imagined. If there were some other theory, it became the duty of the trial court to pick between the theories; *not to do as the court below apparently did: to dismiss one merely because of the claimed existence of the other.* To illustrate the proper approach, see *Long v. Cal.-Western States Life Ins. Co.* 43 Cal. 2d 871, where the court said at page 877:

> "The issue was thus sharply defined for the jury's evaluation of the *physical evidence* in determining whether the bullet entered the forehead consistent with *plaintiff's theory* of accidental death or entered at the temple consistent with *defendant's theory* of suicide. The jury's verdict for defendant establishes that it rejected plantiff's theory and accredited defendant's theory * * *" (Emphasis added)

The trial court's misapprehension of the law regarding the precise nature of appellant's burden of proof below controlled its decision. The error requires reversal. The faulty determination of a factual case due to an erroneous legal theory requires a reversal. *Williams v. U. S.,* 76 S.Ct. 100; *Sachs v. Ewings,* 133 Fed. 2d 403.

II.

IN ANY EVENT, THE UNCONTRADICTED EVIDENCE OF PHYSICAL FACTS, AND THE EVIDENCE AS A WHOLE, IS INCONSISTENT WITH ANY REASONABLE THEORY EXCEPT SUICIDE. NO PROFFERED THEORY OF ACCIDENT HAS SUPPORT IN REASON OR COMPETENT EVIDENCE. THUS, REGARDLESS OF WHAT APPELLANT'S BURDEN OF PROOF MAY HAVE BEEN AT THE TRIAL LEVEL, THE FINDINGS OF ACCIDENT CAN NOT BE SUSTAINED.

A. It Was Respondent's Burden to Support Any Theory of Accident with Competent Evidence of Physical Facts Consistent with Accident and Inconsistent with Suicide.

Appellant contends that even with all the activity of respondent's counsel shortly after the death in hiring criminologists and attempting to collect evidence against suicide, no evidence whatsoever of physical facts was produced which would reasonably support any theory of accident. Respondent produced no evidence of scuff marks which would have indicated that the deceased slipped and fell. Respondent produced no evidence of microscopic examination of the gun or furniture near the place of shooting to show that the trigger had come in contact with any protruding furniture. Respondent did not produce a sample board showing butt indentations caused by the firing of the gun when struck upon the floor. Respondent produced no evidence of grease on the hands of the deceased to lend support to a theory that deceased's hands had slipped while holding the barrel of the gun (Dr. Kirk examined the body—R. 494).

Should *appellant* have cured these omissions? Should appellant have been required, when notified of the death long after the event, to collect such *negative* evidence? How competent would any testimony be, for example, to the effect

that months after the accident there were no scuff marks on the floor, thus indicating that the deceased had not slipped? But the law imposes no such impossible burden upon appellant. In a suicide defense case, just as in any other case, the determination of the question of fact of suicide is dependent upon evidence introduced, not speculation advanced. "A suicide case should be tried like any other case, and metaphysical reasoning about presumptions and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases." *Richardson v. New York Life Ins. Co.,* 174 Fed. 2d 475. The rule is that appellant's burden of proof (even at the appellate level) "is met by *proof* that is *in*consistent with any *reasonable* theory of death by accident or by the act of another." (Emphasis added.) *New York Life Ins. Co. v. Alman,* 22 Fed. 2d 98. Where the *physical facts* are consistent with the defense of suicide, but are not consistent with the respondent's theory of accident, the burden of proof for all practical purposes is upon the respondent to adduce actual physical evidence of accident. Mere theories advanced or possibilities argued by respondent which are not based on competent evidence of physical facts and which are inconsistent with uncontradicted *physical facts* will not suffice. The following cases illustrate or state this rule.

In *Aetna Life Ins. Co. v. Tooley,* 16 Fed. 2d 243, the facts were as follows. The insured was found dead in his automobile about noon, less than two blocks from his home. Skidmarks showed that the brakes had been applied for a distance of about 60 feet immediately before the car had stopped. The body was found leaning on the front seat, his head toward the right side, his left hand on the driving wheel,

his right hand under the body and the right foot on the brake. A pistol was found under his body. The pistol was of a single-action type, which could be cocked only by hand before firing. One freshly exploded cartridge was in the chamber. He was shot through the head, and powder burns indicated that the muzzle had been held against or within a few inches of the right temple. The beneficiary claimed that the pistol might have been discharged accidentally as the insured was taking the pistol out for the purpose of shooting a wild animal, that having seen the animal he immediately put on his brakes, reached for the pistol, which discharged accidentally by the hammer being first caught against the side of the pocket or some other object. The court said:

> "But all this is mere conjecture. The car was stopped behind the cedar tree, where it could not be seen from the house. *The record contains no evidence indicating that there were wild animals in the vicinity;* but, even if there were, it would be a remarkable combination of circumstances that would cause Tooley's accidental death in the manner in which it occurred. Assuming that the pistol had been left in the pocket of the automobile after a trip to the ranch or into the country, it was not self-cocking, but was of the type that had to be cocked by hand. *Of course, if the hammer had caught on some object and been suddenly jarred, it is possible that it might have been discharged. But at that distance the powder burns would have extended further away from the wound, or there would have been none at all.*
>
> "Again, the bullet entered at one temple, and, after going straight through the head, came out at the other, as is usual in so many cases of suicide. That the wound would have been at the same place in the event of accidental discharge in the manner supposed is hardly possible * * * " (page 245) (Emphasis added).

In a slightly different case, *Burkett v. New York Life Ins. Co.,* 56 Fed. 2d 105, the insured had died from a gunshot wound through the roof of his mouth into the brain. The gun, a rifle, contained one exploded shell and lay about three feet from the body, the butt towards the body. There were powder burns on the skin, and there was even testimony that the gun had gone off once accidentally when being set against something. The court said (page 108):

> "There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally coming in contact with another object with sufficient force to produce that result. *That the firing was so caused is a mere possibility supported by nothing shown by the evidence.* The nature of the wound and the fact that blood and brains were found on the roof of the adjoining building show that, when the shot was fired, the insured must have been in a standing position, and that the gun was pointing upward, the muzzle of it being in close proximity to the part of the head which was blown off. Where the insured was when the fatal shot was fired, there was, *so far as any evidence indicated,* nothing except the pavement beneath him with which the hammer accidentally could come in contact with sufficient force to cause the firing. If in an accidental fall of the gun the hammer had struck the pavement with the result that the gun was fired it is not reasonably conceivable that the shot would have gone in the direction which the evidence showed it went. * * * The evidence was such that none of it had a substantial tendency to prove that the death was accidentally caused * * *" (Emphasis added).

In *Brotherhood of Maintenance of Way Employees v. Page, supra,* a case involving a pistol shot through the head, the court said:

> "How, then, did the insured kill himself? Appellee makes this answer: 'It is as reasonable to assume that

deceased was examining the pistol, when it was accidentally discharged, or that he was overcome by one of his falling spells (to which he was subject), and in attempting to steady himself by grabbing at the shelf on which the pistol lay, caused its accidental discharge, as to assume that he deliberately placed the gun to his head and took his own life.'

"*We do not think these theories can be accepted with any show of reason, or that they would be seriously considered, if this were not a controversy between a bereaved widow and an insurance company* * * *" (page 537).

" 'There is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted. It is presumed to have been accidental until the contrary is made to appear.' *But no case has ever held that this presumption was conclusive and might not be overcome by testimony. Nor had any case ever held that the testimony must be that of eye witnesses. It is, on the contrary, a matter of common knowledge that suicide is usually committed with as much secrecy as possible, and would be but rarely shown except by proof of the facts and circumstances attending its commission.*" (page 538) (Emphasis added)

In this case a judgment for the beneficiary was reversed.

The above *Burkett* case and other like cases are cited by the California court in *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 883; they state the California rule. And, to illustrate the converse situation, see *Wilkerson v. Standard Acc. Ins. Co.*, 180 Cal. 252, where findings against suicide were sustained because there was *some* competent evidence of physical facts to support a theory of accident. There the deceased died as a result of a pistol wound directly into the forehead. *But, there were no powder marks* (a fact incon-

sistent with suicide). The body was found prostrate in front of the washbowl in his hotel room. On the mirror above the bowl and the woodwork below it there was a smattering of blood and brain matter, and an expert testified that such a wound would spurt back blood. *On the bowl was a black mark, as if some kind of hard object had fallen, chipping and discoloring the surface* (a fact consistent with a theory of accident). A small drawer below the mirror had been known to contain the deceased's revolver and shaving materials. A leather holster still lay in the drawer. No motive for suicide was shown or attempted to be shown. The court held that it was not inconceivable that he had been standing erect, with his head inclined toward the bowl, had accidentally dropped the weapon, which discharged, and by reflex of the body the blood spurted from a higher place than from where the shot was fired. The court said "it is possible that, had we been sitting as the jury in this case, we should have come to a different conclusion from that which the jury did arrive * * *" (p. 255-256), but, noting the above evidence of accident, affirmed the judgment on the verdict.

Compare the case at bar with the *Wilkerson* case. *Here there were powder marks.* Here there is no evidence whatsoever to show that the gun had fallen, had been jarred, or that an open latch mechanism had to be closed.

B. Respondent Proved No Facts Inconsistent with Suicide and Consistent with Accident.

Giving all possible credit to respondent's evidence, even to the inadmissible testimony of her experts, it is obvious that there is no substantial basis for any finding of accident. That evidence, reduced to essentials, is that the deceased gave no indication to family or friends of suicidal intent or tendency, and that a month after the death the rifle was dis-

charged once on repeated attempts at striking the butt on the floor, or by hitting the hammer spur with a hammer, with some unknown force. But, neither of these two assumed facts suffice.

The former has been judicially held not to be a fact inconsistent with suicide. In the *Burkett* case, *supra,* cited in the *Long* case, the court said, "The fact that the insured's situation and surroundings were such as to make it seem to others unlikely that his worries about his physical condition would make him wish to take his own life was not inconsistent with the existence of the suicidal intent." As the court said in *Walker v. Phila. Life Ins. Co.,* 127 F. Supp. 26 at page 30:

> "Plaintiff counsel content themselves with referring to certain bizarre facts, and admittedly there are several, such as the deceased's naturally jovial disposition, his light and good humor the night before, his having mapped out plans and itineraries for the next few days with his son, his taking a shower and shaving, and packing his bag just before the shot was heard, and leaving his bedroom open, but the fact remains—the evidence shows that his death was not accidental."

The holdings of these courts are supported by the uncontradicted testimony of Dr. Bennett, expert on suicides. He testified as follows:

> "Q. Now, Doctor, in the particular type of—I believe you called it cyclothymic personality—would such a type of personality include one who was a successful businessman?
>
> "A. Yes, they frequently are extremely successful.
>
> "Q. Would such a personality include a person who would be happy at home?
>
> "A. Would be happy at home?
>
> "Q. Yes. Have a happy home life and—apparently a happy home life.
>
> "A. Oh, yes, that's—

"Q. And would such a personality include also one who would apparently during the moments of exhilaration love life?

"A. Yes, they are very extroverted, outgoing people" (R. 298).

And since this testimony is uncontradicted and unimpeached, it could not and cannot be arbitrarily rejected. "Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true by the trier of fact * * *" *Dobson v. Dobson,* 86 C.A. 2d 13, 14.

The *Burkett* case, *supra,* is also helpful respecting the testimony of possible ways of firing the rifle other than the obvious way of pulling the trigger. Such evidence would be of facts inconsistent with suicide and consistent with accident, *only if there were some evidence of physical facts from which it could be inferred that the rifle actually had fired in the manners described.* Mere possibilities, without some connecting link with actualities, do not suffice. "That the firing was so caused is a mere possibility supported by nothing shown by the evidence." *Burkett v. New York Life Ins. Co.,* 56 Fed. 2d 105, 108. Note again that the evidence disclosed nothing other than that the rifle had come in contact with the floor (as in the *Burkett* case). Respondent produced no evidence of butt impressions made by striking the floor with the rifle. And, "if in an accidental fall of the gun the hammer had struck the pavement with the result that the gun was fired it is not reasonably conceivable that the shot would have gone in the direction which the evidence showed it went * * *" *Burkett* case, p. 108.

C. Since the Evidence of Physical Facts, and the Evidence as a Whole, Is Inconsistent with Accident But Is Consistent with Suicide, Appellant Proved Its Defense as a Matter of Law.

The trial court held, "In the instant case there is nothing, either in insured's actions or statements which would indicate suicidal intent or disposition" (R. 51). This, of course, is to ignore completely Dr. Bennett's uncontradicted and unimpeached testimony and appellant's other evidence on motive. For the trial court so to dismiss the statements of a renowned medical expert, specially trained by study, teaching and practice in the subject of suicide and suicidal tendencies is glaring error and illustrative of the court's misconception regarding the nature of proof of "motive" in suicide cases. *The* motive need not be proved; *possible* motives suffice.

The evidence as a whole discloses several possible "motives" traditionally relied on by the courts. The evidence respecting deceased's personality, the admission that deceased suffered periods of depression, suffices as a "motive." *Burkett v. New York Life Ins. Co.,* 56 Fed. 2d 105; *McClelland v. Great Southern Life Ins. Co.,* 220 S.W. 2d 515. Fear of disclosure of an indiscretion with a woman is a "motive." *New York Life Ins. Co. v. Alman,* 22 Fed 2d 98. And, of course, running debts may be a "motive."

But all this makes no difference. Even if it be assumed that no evidence of motive or suicidal tendency was presented by appellant, the absence is not a fact inconsistent with suicide. *Knapczyk v. Metropolitan Life Ins. Co.,* 53 N.E. 2d 484; *Aetna Life Ins. Co. v. Tooley,* 16 Fed. 2d 244; *Burkett v. New York Life Ins. Co.,* 56 Fed. 2d 107.

The important point is that the physical facts themselves are consistent only with suicide and are inconsistent with accident. There was no reason other than suicide for de-

ceased to go down to the basement and get a gun, dressed as he was, and at a time when he was expected to eat the breakfast his wife was preparing in the kitchen upstairs. He was not dressed to do anything normal with a gun. He was not planning any hunting trips nor planning to do any shooting of any kind. The gun and ammunition were in the remote portion of the basement where the gun was fired. The deliberate intent to go there and get a gun and ammunition was plain. He did not say anything to his wife or daughter as to his purpose, even though he passed them on route downstairs. He stooped over the gun and put the muzzle within an inch of his powder-blasted chest so as to hit the heart area. There was only one shell in the gun, that being the shot that killed him. The dent in the wood floor was caused by the recoil where the gun rested, not by a fall. The muzzle was so close to the chest of the deceased as to make blast powder burns on the chest-heart area. The gun was found near the ammunition. The gun was of such short length that a person of deceased's size bent on suicide would bend over deliberately and point the muzzle to his heart to cause the powder marks. The firing took place in the center of the passageway at which point there were marks of blood. He walked or crawled about fifteen feet away where the body was prone with his hands under him. He was an experienced hunter, with a record of careful handling of guns and as such was acquainted with the lethal characteristics of a gun. He was accustomed to using such a weapon for killing.

Did the deceased fall over the rifle? Appellant submits it is beyond all reason to speculate that a fall would have placed him directly over and within one inch of the rifle

muzzle, with a rifle standing upright by itself (!) his body bent more than parallel to the floor, the muzzle of the rifle pointed at his heart. "Where a person trips, the normal movement is to throw out the hands to break the impending fall." *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal. 2d 871. That, of course, would have caused the deceased's gun and his hands to fly away from his body, rather than position them to do a certain self killing. As the court said in *New York Life Ins. Co. v. Alman,* 22 Fed. 2d 98: respecting a similar wound: "The possibility of death by accident is excluded by the nature and location of the wound."

Did the deceased lean down to close the latch mechanism and in the process push the trigger? Did the deceased lean down to close the latch mechanism and in the process push the trigger? There was no proof that this was done. No man, it can be assumed, would do so. Place and point the muzzle within an inch from his heart. Did deceased, having leaned down and having closed the mechanism, squeeze the trigger unintentionally? This again would be a completely fanciful and unproved suggestion. The lever action was found closed, and the trigger was therefore protected by the trigger guard. In any event, it is impossible to imagine a hunter accustomed to handling guns ever placing himself in such a position in order to close a lever action. A man experienced in handling guns would instinctively have canted the rifle up with his left hand and with his right hand pull the lever mechanism closed in the normal manner with the muzzle pointing away from him. Furthermore, any attempt to close the lever mechanism by bending over the rifle would have tilted deceased's shoulders or his hips, or both, in such a manner as to have placed his chest at an angle to the muzzle of the rifle, rather than directly over it. And finally, if the deceased had bent down to close the lever ac-

tion his hands would have been up and away from trigger, since the lever action was nearer the muzzle than was the trigger.

Did the trigger catch on some object? No, since the indentation of the butt resting upon the floor proved the shot occurred in the center of a clear passageway. Furthermore, there was no evidence that the rifle had come into contact with any object other than the floor, where it made a mark similar to ones caused by resting the rifle on the floor and intentionally pulling the trigger.

There are an infinite number of other equally untenable possibilities, some of them ridiculous. But, like respondent's theories, they are not supported by any evidence. Thus, the round in the chamber might have been defective and fired automatically. But the evidence is that the deceased kept his guns loaded with cartridges in the magazine, not in the chamber. Again, some foreign matter may have come flying through the air to hit the trigger. But no such missile was produced as evidence. As with all *ex post facto* determinations of fact, where there are no eye witnesses, no probabilities other than possibilities. And, in view of the evidence of physical facts, the only probable way in which the rifle was fired was the usual way, the way 999.99% of rifles are fired, by pulling or pushing the trigger. And when a rifle containing only one round is fired with a muzzle within one inch of the heart area of the chest, while the body and the rifle are in the position where the trigger might be most conveniently pulled or pushed and where it is extremely unlikely the body and rifle would have been if the deceased fell or slipped, the only reasonable hypothesis is suicide.

This being so, appellant was and is now entitled to judgment. Where the undisputed physical facts are inconsistent with a theory of accident but are consistent with suicide,

the defense of suicide is proved as a matter of law. *New York Life Ins. Co. v. Alman,* 22 Fed. 2d 98; *Aetna Life Ins. Co. v. Tooley,* 16 Fed. 2d 243; *Burkett v. New York Life Ins. Co.,* 56 Fed. 2d 105; *New York Life Ins. Co. v. Anderson,* 66 Fed. 2d 705; *Planter's Bank of Tunica, Miss. v. New York Life Ins. Co.,* 11 Fed. 2d 602; *New York Life Ins. Co. v. Weaver,* 8 Fed. 2d 680; *New York Life Ins. Co.,* 56 Fed. 2d 105; *Richardson v. New York Life Ins. Co.,* 174 Fed. 2d 475; *Brotherhood of Maintenance of Way Employees v. Page,* 123 S.W. 2d 536; *Industrial Mutual Indemnity Co. v. Watt,* 130 S.W. 532; *New York Life Ins. Co. v. Watters,* 243 S.W. 831; *McMillan v. General American Life Ins. Co.,* 9 S.E. 2d 562; *McDaniel v. Metropolitan Life Ins. Co.,* 195 S.E. 597; *New York Life Ins. Co.,* 53 N.E. 2d 484; *Mutual Benef. v. Denton,* 124 S.W. 2d 278; *McClelland v. Great Southern Life Ins. Co.,* 220 S.W. 2d 515.

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF LOWELL BRADFORD AND DR. KIRK REGARDING THE RESULTS OF GUN-FIRING EXPERIMENTS AND THEIR OPINIONS DERIVED THEREFROM.

Although the trial court self-servedly said: "The court must first state that it would reach exactly the same decision in this case whether this evidence was presented or not" (R. 52), it is apparent from respondent's arguments below and from other statements of the trial court that the admission of the testimony of Bradford and Kirk was highly prejudicial. For example, the trial court also stated, "Defendant's counsel relies heavily on the position of insured's body and gun to establish suicide. Admitting for the sake of argument that these factors are consistent with suicide, there is nothing else to support a suicide theory. It is un-

controverted that the gun could have been fired accidentally in one of several ways * * *" (R. 49). Appellant, however, contends that there is no competent evidence to show that the gun could have been fired by any way other than squeezing or pushing down upon the trigger.

A. Respondent Failed to Lay a Proper Foundation for Her Evidence of Experiments. There Is No Proof That the Tests Were Made Under Conditions and Circumstances Which Were Essentially the Same as Those Which Existed When the Death Occurred. Respondent Thus Failed to Meet Her Burden of Proof, and Consequently the Evidence Was Inadmissible.

Before the testimony of Dr. Kirk and Bradford regarding their gun-firing tests could become admissible, if at all, it was incumbent on respondent to show the facts surrounding the experiment and to show that the circumstances were substantially similar with those existing at the time of the accident. *McGough v. Hendrickson,* 58 C.A. 2d 60; 18 *Cal. Jur.* 2d 678, Evidence § 205—Experimental Evidence and Tests. This she completely failed to do.

There was no evidence that the gun had remained in the same condition. On the date of death, February 22, it passed into the hands of the Deputy Coroner (R. 112). Then from him to the police, to Dr. Kirk, and then to Lowell Bradford a month after the death (R. 501). The presumption of unchanged condition does not operate retroactively. See *Bergen v. Tulare County Power Co.,* 173 Cal. 709, 716.

The cartridges used were not similar, since *the bullet and powder had been removed.* Obviously their removal might make a vast difference in results.

There was no testimony that the type of surface against which the butt was struck was similar to the floor in deceased's basement, Plaintiff's Exhibit 12.

There was no testimony as to the height from which the gun was dropped nor as to the amount of force or speed with which the gun was struck by the hammer or upon the floor.

Neither expert testified that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance or speed to have caused the gun to fire.

No evidence of butt impressions was introduced showing similarity between the butt impressions made by intentionally pulling the trigger (Pl's Ex. 12, R. 511), and the impression caused by the firing when the gun was dropped.

The improper purpose of the experts' testimony, of course, was to attempt to prove the possibility of accident. But gun-firing experiments to prove or disprove theories of accidents, if admissible at all, require strict conformance to the rule that conditions and circumstances be substantially similar. The tests should be correlated with the position of the body. *People v. Wagner,* 29 C.A. 363. The court there said at pp. 368-369:

> "'Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible where the conditions attending the alleged occurrence and the experiments are not shown to be similar. *The similarity of circumstances and conditions goes to the admissibility of the evidence* and must be determined by the court. * * * Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court from the nature of the experiments that the jury will be enlightened rather than confused. *In many circumstances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence,* and make it harmful rather than helpful.'" (Emphasis added.)

B. Furthermore, the Failure of Respondent to Prove That the Rifle at the Time of the Tests Was in the Same Condition as It Was at the Time of Death, Makes the Ballistics Evidence Irrelevant, Incompetent and Immaterial.

The most that can be said for respondent's evidence respecting ballistics tests is that it proved that the rifle could be fired once after several attempts so to do by striking the butt or hammer spur on the day the tests were made, March 25, 1954. In order to raise the inference that it was in the same condition on February 22, 1954, some evidence was required to show that its condition had remained unchanged since that date. There was no such evidence. It, therefore, proved nothing material or relevant to the case. See *Waterman v. Liederman,* 16 C.A. 2d 483, 486.

C. In Any Event, the Opinion Testimony of the Respondent's Experts Was Clearly Inadmissible.

The trial court permitted Dr. Kirk to give his opinion that it could "very definitely have happened" that the deceased killed himself while leaning over to close the lever action mechanism, or by dropping the rifle (R. 515). Like testimony was given by Lowell Bradford (R. 529). This testimony is so clearly inadmissible as to leave little room for argument. First, the testimony is not the proper subject of expert opinion. Second, it is not based on any competent evidence in the case; the lever action mechanism was found closed and the butt impressions on Plaintiff's Exhibit 12 were made when the gun was intentionally fired while the butt *rested* (not slammed) upon the floor.

As the court said in *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal. 2d 871, 882, regarding similar testimony:

> "The court's ruling excluding such testimony was correct. This is not a situation comparable to the opinion of a qualified physician relative to the means which might have been employed to produce a given injury, a subject on which he would have peculiar knowledge by rea-

son of experience and study * * * Experiments which can be made without special knowledge or training and which are largely based upon speculation or conjecture are not properly the subject of expert testimony."

Whether a firearm could have been accidentally discharged, where the position of the wound and the course taken by the bullet are known, is not the proper subject of expert testimony. *People v. Heacock,* 10 C.A. 450; 19 *Cal Jur* 2d 95, Evidence § 367—Ballistics.

What makes the error of admitting respondent's evidence even more grievious, however, is the action of the court in refusing appellant permission to rebut it.

IV.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO PERMIT RESPONDENT TO PUT INTO EVIDENCE THE INADMISSIBLE CORONER'S JURY VERDICT AND YET PREVENT APPELLANT FROM REBUTTING OR EXPLAINING THE CIRCUMSTANCES SURROUNDING THE VERDICT OR FROM REBUTTING WITH OPINION EVIDENCE OF ITS OWN. THE OPINIONS THEREIN OR THE OPINIONS OF RESPONDENT'S WITNESSES.

There was no issue at the trial as to the deceased's death or date of death, or submission of proofs of loss. Yet, over appellant's objection, respondent put in evidence the death certificate and verdict of the Coroner's jury (R. 333, 335). The latter recites: "This jury is unable to decide from the evidence whether this is suicidal or accidental." (R. 333). Such purported evidence was not only irrelevant to any issue in the case but proved nothing at all; it was immateial. Of course, had the Coroner been permitted by respondent's counsel to issue his death certificate without a Coroner's jury, his certificate would have been proper evidence for appellant. *Bryson v. Manhart,* 11 C.A. 2d 691. It would have been *prima facie* evidence of the facts stated therein. But no facts were stated in Plaintiff's Exhibits 5 or 6, and

they could have been of no possible legitimate use in the case.

It is obvious why respondent offered these documents. Since they were based upon the testimony of respondent's experts, marshalled by adversary counsel immediately after the shooting, they lent some vague credence to their opinion evidence adduced at the time of trial.

But since this was done, appellant certainly had the right to explain the circumstances surrounding the making of the verdict and the right to rebut the opinions impliedly impressed in the verdict and in respondent's so-called expert testimony. As the court said in *Pacific Freight Lines v. I.A.C.*, 26 Cal. 2d 234, 238-239:

> "Assuming the admissibility of the death certificate and that it constituted 'prima facie evidence of the facts therein stated * * *' *it was subject to rebuttal and explanation.* (*Estate of Scott,* 55 Cal. App. 2d 780, 782-783 [131 P. 2d 613].) On its face the certificate purported to state nothing as to the cause of the accident except the opinion or conclusion of the Coroner's jury. Such opinion or conclusion had no foundation in fact when correlated with the transcript of the evidence produced at the Coroner's inquest. It should be accorded no greater force than opinions or conclusions of a witness or an expert, the sufficiency of which depends upon whether facts or reasons are given in support thereof * * *" (Emphasis added.)

"Although the introduction of incompetent evidence by one party does not justify the offer of similar evidence by the other, evidence otherwise incompetent may be admissible in rebuttal or explanation of evidence introduced by the adverse party." 18 *Cal Jur* 2d 572-573; Evidence § 129.

Appellant therefore contends that the opinions of those whose experience and practice most often brought them into

contact with suicides or the determination thereof, namely, the police investigators and the Coroner, should have been admitted. This in all fairness should have been done to rebut the opinions expressed or implied in the testimony of respondent's witnesses or Coroner's jury verdict. The reasons for the opinions of the Coroner and police would have been especially enlightening; no doubt they would coincide with appellant's.

The rule allowing rebuttal of an adversary's evidence extends to opinion evidence. *People v. Loop,* 127 C.A. 2d 786, 801-802.

V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ERRONEOUSLY EXCLUDING APPELLANT'S EVIDENCE OF MOTIVE AND SUICIDAL TENDENCIES AND THEN HOLDING THAT THERE WAS NO EVIDENCE OF SUICIDAL INTENT OR DISPOSITION.

In a suicide defense case, the widest possible latitude of proof is permitted. Evidence of acts, conduct and statements of the deceased are admissible to show the deceased's state of mind and the motives with which he acted. *Fidelity Mutual Life Assn. v. Miller,* 92 Fed. 63. In *Bertschinger v. New York Life Ins. Co.,* 166 Oregon 307, 111 Pacific 2d 1016 the Court held it to be the rule that where suicide vel non is the issue and only circumstantial evidence is available, wide latitude should be accorded the parties in the admission of facts and circumstances which may shed light upon the state of mind of the alleged suicide or establish *a* motive for self-destruction. In the case at bar this rule apparently worked only for the advantage of the respondent. Two highly pertinent items of appellant's evidence were excluded, thus enabling the trial court to make its self-serving statement that "in the instant case there is nothing, either in in-

sured's actions or statements, which would indicate suicidal intent or disposition" (R. 51). That statement is flagrantly wrong.

A. The Agent's Report, Made by the Adjuster Within the Scope of His Authority as Delegated from the Deceased to the Deceased's Claims Manager to the Adjuster, Was Admissible Evidence, the Exclusion of Which Was Highly Prejudicial.

Revealing evidence of the deceased's actions and reactions to his unfortunate involvement in the Oregon automobile accident was made available by J. A. Van Doren, the adjuster appointed by Paul Youngers, the deceased's claims supervisor. The haste with which the individual was paid, the expectation of deceased that the adjuster would come armed with sufficient money to make an immediate cash settlement, the deceased's personal supervision of the paying of the money and the making of a release, all are a complete refutation to the attempt of respondent to deprecate the importance of the Oregon accident to deceased's state of mind. Relevancy of the evidence is strengthened by the fact that, as the report shows, the woman involved was quite likely to capitalize on her "fine position," and did, in fact, at a later time attempt to secure more money from the deceased (R. 578-579). Furthermore, the more respondent piled up evidence complimentary to deceased, the worse the Oregon incident became.

Ordinarily a written description of the scene in Hunter's Motel at Lakeview, Oregon, the night after the accident would be inadmissible hearsay. But, California Code of Civil Procedure, § 1870, provides that "* * * evidence may be given upon a trial of the following facts: *5. After proof of * * * agency, the act or declaration of a partner or agent of the party, within the scope of the * * * agency, and during its existence."

Appellant contends that the agency relationship between the deceased and the adjuster, Van Doren, was proved by the testimony of Paul Youngers, the deceased's Casualty Superintendent. His duties included litigating claims and the adjustment of claims (R. 142). The deceased telephoned Mr. Youngers, reported the accident to him, and asked him to take care of the insurance features arising out of the accident (R. 145). Youngers thereupon delegated the duty to the adjuster (R. 147). There was no question of the authenticity of the report inasmuch as the regional superintendent of New Zealand's liability carrier testified that the report was part of the file kept in the ordinary course of business of the liability carrier (R. 205-207).

In line with the provisions of California Code of Civil Procedure § 1870 (5), it therefore has been held that an adjuster's report is such a declaration of an agent as to be admissible in evidence against the adjuster's principal. *Guberman v. Weiner Consolidated Hotels, Inc.,* 10 C.A. 2d 401. And in accordance with the rule permitting a wide latitude of proof, such admissible evidence should have been received below.

B. The Trial Court Committed Prejudicial Error in Excluding Expert Testimony Regarding the Deceased's Suicidal Disposition.

The rule permitting such a wide latitude of proof in a suicide case is based upon the fact that "it is * * * common knowledge that suicide is usually committed with as much secrecy as possible * * *" *Brotherhood of Maintenance of Way Employees v. Page,* 123 S.W. 2d 536. The courts, therefore, search far and wide for possible motives or "reasons" for deaths obviously caused by suicide.

Hence, in more recent years, as scientific knowledge has become more certain respecting personality traits and clas-

sification of emotional and personality disorders, the courts have recognized that the determination of whether an individual possesses suicidal tendencies was a question more aptly put to a medical specialist in the field, rather than solely to a trial judge presumably not versed in the specialty. Thus in *Smith v. Metropolitan Life Insurance Co.*, 47 N.E. 2d 330, and in *McClelland v. Great Southern Life Ins. Co.*, 220 S.W. 2d 515, expert testimony was admitted for the purpose of showing that the insureds in those cases, due to emotional and personality factors, possessed suicidal dispositions and tendencies.

Because respondent's evidence of the deceased's personality would tend to appear to the layman to be non-suicidal, appellant sought expert opinion testimony from an expert in the field, Dr. A. E. Bennett, for two reasons: (1) to secure his opinion evaluating respondent's evidence to the effect that the deceased "loved life," was an extrovert, happily married, in good health, cheerful on the afternoon of his death, and (2) to secure his evaluation of the deceased's hypomanic behavior in Lakeview, Oregon, and its relation to his behavior in San Francisco. Appellant contends that his evaluation of these facts should have been most helpful to the trial judge.

Admissibility of expert testimony is judged by determining whether the testimony would add instruction to facts already in evidence. "The opinion of an expert should be received if it adds instruction to that which the jury is able to obtain from the data before it." *Blinkinsop v. Weber*, 85 C.A. 2d 276, 283. This is especially true in the case at bar. Obviously the answer to the question, "Why does a man commit suicide?" can best be answered by one specially trained and educated in the subject of suicidal types and suicidal states of mind. And where evidence is presented to

the layman which would make it appear that the deceased would not commit suicide, but where in fact to the expert such evidence would show he was of the type who would, then the expert opinion becomes not only helpful but necessary to a proper and unbiased determination of the issue.

The court so held in *Smith v. Metropolitan Life Ins. Co.*, 47 N.E. 2d 330 at 333:

> "The offer of proof included a statement by Dr. Brown that the attacks of depression were typical in every respect of those seen in the depressed phase of manic-depressive psychosis, and his opinion that a patient so afflicted has a tendency to commit suicide. The court sustained plaintiff's objection to the offer, and the question presented is whether the court erred in this behalf and whether upon a retrial of the cause, testimony of that character should be admitted.
>
> * * * * * * *
>
> "We think the proffered testimony was relevant to the issue on trial. The evidence as to Smith's death was entirely circumstantial. In order to negative suicide and establish death by accidental means, plaintiff was permitted to adduce evidence that he was in good health, happily married, cheerful on the morning of his death, and that he attended his business during part of that forenoon. Taken with evidence of certain physical facts attending insured's death, Dr. Brown's testimony was offered to negative and rebut the circumstances tending to show death by accidental means, and to show subjective ailments as a basis for suicidal intent. Where the defense is death by self-destruction, the authorities hold that a reasonable latitude should be allowed in establishing that defense.
>
> "In *Falkinburg v. Prudential Ins. Co. of America,* 132 Neb. 831, 273 N.W. 478, 480, suicide was the controverted issue. The insured died February 28, 1935, from a gunshot wound. The trial court excluded the testimony of two physicians who had examined the insured

prior to his death. The purpose of the testimony was to show his physical and mental condition in August, October and December, 1934, when he was examined by the physicians whose testimony was proffered. The insurance company offered to prove by one, a specialist in mental and nervous diseases, that there were indications of brain tumor and mental deterioration; the other physician found that on December 10, 1934, the insured was apprehensive, worried, easily excited, nervous and suffering from a 'manic-depressive psychosis, a form of melancholia,' accompanied by an agitated mental state in which he was much worried, exhibited fear and lost his sense of proportion. In reversing the judgment for plaintiff on the ground that the trial court erred in excluding the testimony offered, the court said that " 'Where circumstantial evidence is the only evidence available to a party, and the action must be determined upon the relative strength of probabilities and inferences, great latitude is allowed the parties in the adduction and admission of evidence'." 2 Jones, Commentaries on Evidence (2d Ed.) § 604. The more the jury can know of the surrounding facts and circumstances, the better their judgment is likely to be. The physical and mental health of the insured is a surrounding circumstance which is relevant in this case, and the testimony on this matter was unduly restricted.'

"In *Bertschinger v. New York Life Ins. Co.,* 166 Or. 307, 111 P.2d 1016, it was held to be the rule that where suicide vel non is the issue and only circumstantial evidence is available, a wide latitude should be accorded the parties in the admission of facts and circumstances which may shed light upon the state of mind of the alleged suicide or establish a motive for self-destruction. In *Prudential Ins. Co. v. Morris,* 3 Cir., 72 F.2d 824, the court held that 'Any facts making it probable that his death (the insured's) was the result of suicide are relevant. Along with the other facts surrounding his death, causes which would impel him to take his own life are evidential, indicating a motive, and therefore

admissible.' In *Sees v. Massachusetts Bonding & Ins. Co.,* 243 App. Div. 400, 277 N.Y.S. 198, 202, which involved death by monoxide asphyxiation, the court said: 'In a case of this character, where the intention of the insured is in and of itself a distinct and material fact to be ascertained by a chain of circumstances, there should be a liberal opportunity afforded for introducing any evidence which would throw light upon the issue. Facts such as declarations, acts, and disposition tending to show an intent or motive for suicide are relevant and admissible.' (Citing cases.) In *Cady v. Fidelity & Casualty Co.,* 134 Wis. 322, 113 N.W. 967, 17 L.R.A.N.S. 260, it was held that evidence of the state of health of an insured person for a considerable period of time prior to his death, where it is claimed he died by suicide, is proper as bearing on whether the deceased came to his death as the result of suicidal intent."

VI.

THE FINDINGS ON MISREPRESENTATION ARE CONTRARY TO THE EVIDENCE. THE DECEASED'S MISREPRESENTATIONS IN THE INSURANCE APPLICATION RESPECTING HIS DRINKING HABITS ENTITLE APPELLANT TO RESCIND THE CONTRACT OF INSURANCE.

The court below held that the deceased's statements in his insurance application were mere expressions of his opinion (R. 42) and found that no misrepresentation, nor any material misrepresentation had been made by him (R. 75-76).

But it is difficult to see how such a finding could be made in view of the evidence in this case. The evidence is undisputed that Houston habitually used alcoholic stimulants, and at times used them to excess. At business lunches he would have several highballs. A good friend of the insured, Mrs. Virginia Wilkerson, admitted that on his trips to Lakeview, Oregon, when he was without his wife, Houston was under the influence of alcohol a great deal of the time. He

would have as many as eight highballs. He would begin drinking in the mornings and would drink during the day. The witness, Mrs. Jean Pierson, testified that she saw him on several occasions intoxicated early in the morning, being unruly and obnoxious. Bear in mind, also, that Mrs. Wilkerson was a witness hostile to us, an admitted friend of the deceased. Houston's drinking record in Oregon earned him the nickname, "Wild Bill Hiccup."

The question before the court is whether Houston truthfully revealed to the insurance company his drinking habits. Is the above evidence of drinking consistent with a representation that the individual drank only "occasionally" and *never* drank to excess? The California court has answered this question:

> "If you find from the evidence that the deceased was in the habit of using wine, spirits or malt liquors and that had persisted for some time and that he had on more than one occasion used them to excess, then you should find that the representations herein are false."
>
> *McEwin v. New York Life Ins. Co.,* 42 Cal. App. 133, 143.

Furthermore,

> "In the present case, it was the condition and history, not the insured's opinion respecting it, which should have been disclosed."
>
> *Telford v. New York Life Ins. Co.,* 9 C.2d 103, 108 (1937).

The effect of such a false representation is set forth in the California Insurance Statutes:

> "Sec. 331. A representation is false when the facts fail to correspond with the assertion or stipulation.
>
> "Sec. 359. If a representation is false in a material point, the insured party is entitled to rescind the contract from the date the representation becomes false."

These statutes are rigidly enforced. In *Telford v. New York Life Ins. Co.,* 9 Cal. 2d 103, the court said:

> "A false representation or a concealment of fact, whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intention to deceive is not essential."

And the purpose of these rules is rather obvious:

> "An insurance company is entitled to determine for itself what risks it will accept and therefore to know all the facts relative to the applicant's physical condition. It has the right to select those whom it will insure and to rely on him who would be insured for such information as it desires as a basis for a determination to the end that a wise discrimination may be exercised in selecting its risks."
>
> *Robinson v. Occidental Life Ins. Co.,* 131 Cal. App. 2d, 581, 586.

There can be no question of the materiality of Houston's representations. "It has been held that answers to written questions set forth in application forms relative to insurance are generally *deemed* material representations * * *" *California-Western States Life Ins. Co. v. Feinsten,* 15 Cal. 2d 413, 423. The parties to the contract, by putting and answering specific questions, have made the matters covered by such questions material.

Insurance Code Sec. 334;

Pierre v. Metropolitan Life Ins. Co., 22 Cal. App. 2d 346;

California-Western States Life Ins. Co. v. Feinsten, 15 Cal. 2d 413;

Parrish v. Acacia Mutual Life Ins. Co., 92 F. Supp. 300;

Wilson v. Maryland Cas. Co., 19 Cal. App. 2d 463;

Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734;

McEwen v. New York Life, 23 Cal. App. 694;

McEwen v. New York Life, 42 Cal. App. 133;

Maggini v. West Coast Life, 136 Cal. App. 472;

14 *Cal. Jur.* 502, 636.

VII.

IN ANY EVENT, IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE EVIDENCE OF APPELLANT'S PRACTICES OF UNDERWRITING RESPECTING AN UNFAVORABLE HISTORY OF DRINKING HABITS.

As is the case with its findings against suicide, the trial court's findings against misrepresentation in the application rest upon rulings excluding pertinent evidence. In fact, the trial court's rulings on evidence of materiality of the representations left the record devoid of any evidence on that issue. The finding follows from this error. But the rulings on evidence were wrong.

Cal. *Ins. Code* § 334 provides that the materiality of facts concealed (and misrepresented) depends upon their influence *upon appellant* in accepting or rejecting its risks:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

It obviously therefore is proper to put to a qualified representative of appellant the question whether the policy sued upon would have been issued appellant under present underwriting practices if it had known deceased's history of drinking habits. The sustaining of respondent's objection to this question (R. 327) runs directly contrary to California authority. *Allstate Ins. Co. v. Miller,* 96 C.A. 2d 778; 781;

Maggini v. West Coast Life Ins. Co., 136 C.A. 472, 476, hold that the answer "no" to such a type of question supports a finding that the representations were material.

The trial court went further, however, and refused to hear evidence of insurance practices respecting drinking habits (R. 329). This ruling completely foreclosed appellant's evidence on the point and was patently prejudicial. As the California court has said:

> "Appellants also contend that the court erred in its rulings on the admissibility of evidence presented by insurance experts on behalf of the respondent insurer. This court finds no error in that regard. The questions propounded to those witnesses did not call for an opinion on the question whether the undisclosed facts here in issue were material to the risk. The witnesses were merely asked relative to a usage or custom in the matter of rejecting a risk had the companies been apprised of the facts such as here were concealed."
>
> *Cal. West. States Etc. Co. v. Feinsten,* 15 Cal. 2d 413, 424.

VIII.

THE TRIAL COURT ERRED IN ASSESSING INTEREST AGAINST APPELLANT FROM MAY 4, 1954. THERE IS NO EVIDENCE AND NO FINDING TO THE EFFECT THAT RESPONDENT GAVE NOTICE TO APPELLANT OF ANY ELECTION TO TAKE THE FULL COMMUTED VALUE OF THE POLICY AS OF THAT DATE OR ANY DATE.

Under its contract of insurance, appellant was subject to two alternative obligations in case the policy ever became operative. One was to pay initially a monthly family income for the period provided for at the end of which the principal amount became due, or to pay the commuted value as of the date of death (R. 61). The trial court in awarding judgment gave judgment for the commuted value plus interest from the date proofs of loss were submitted to the date of judg-

ment. Appellant contends that this award of interest was erroneous.

California Civil Code § 3287 provides that interest as damages is recoverable only from the day upon which the right vests. As the California Supreme Court has said:

> "Where there is no express contract covering the matter, the law awards interest on money from the time it becomes due and payable if such time is certain or can be made certain by calculation. (Civ. Code, §§ 3287, 3302; *Pitzer v. Wedel* [1946], 73 Cal. App. 2d 86, 92-93 [165 P.2d 971]; 14 *Cal. Jur.,* Interest, § 5, p. 678). In the absence of a showing as to such time, and in the absence of a demand for interest, there is no occasion to award it * * *"
>
> *Budget Finance Plan v. Sav-On Food Club,* 44 Cal. 2d 565, (FN, p. 572).

Respondent failed to give notice to appellant that she elected to take the commuted value of the policy. Hence, no right to interest on that amount vested in her as of May 4, 1954, as held by the trial judge. Cal. Civ. Code § 1449 provides:

> "If the party having the right to selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

The amount of such interest assessed against appellant on the total amount of said commuted value to date of judgment is $3,531.84, a sum so substantial as to warrant redress in this Court, in case appellant is otherwise unsuccessful.

CONCLUSION

Since the record is replete with so many varieties of errors, there are at least three solutions in this Court.

First, the judgment should be reversed with directions to enter judgment for appellant, since (1) the uncontradicted evidence of physical facts is inconsistent with a theory of accidental death but is consistent with a theory of suicide, and (2) there is uncontradicted evidence of material misrepresentations in the application for insurance.

Second, the judgment should be reversed at least for a new trial, the decision below having been based upon an erroneous legal theory respecting appellant's burden of proof and upon prejudicially erroneous rulings on the admission and exclusion of evidence.

Third, in any event and failing a complete reversal, the portion of the judgment respecting interest should be reversed for lack of evidence or a finding on any election of respondent to take the commuted value as of the date from which interest was assessed.

Respectfully submitted,

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